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No. 03-1071

Supreme Court, U.S.
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In The
Supreme Court of the United States

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY, INC.; DAVID C. JONES; and FRANCES A. KAUL,

Petitioners,

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; and SONNY J. O'NEAL, Supervisor, Okanogan National Forest,

and

WASHINGTON ENVIRONMENTAL COUNCIL, OKANOGAN WILDERNESS LEAGUE, CENTER FOR ENVIRONMENTAL LAW & POLICY, DEFENDERS OF WILDLIFE, TROUT UNLIMITED, and AMERICAN RIVERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT WASHINGTON ENVIRONMENTAL COUNCIL'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the United States Forest Service have discretionary authority under the Federal Land Policy and Management Act and other applicable law to condition the renewal of a revocable right-of-way for an irrigation ditch occupying National Forest lands on minimum stream flow requirements needed to ensure the survival and recovery of endangered fish species within the National Forest, where the permit applicant has no easement or other vested right to use National Forest land?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Washington Environmental Council, Okanogan Wilderness League, Center for Environmental Law & Policy, Defenders of Wildlife, Trout Unlimited, and American Rivers, non-profit corporations organized under the laws of Washington, hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Washington Environmental Council, Okanogan Wilderness League, Center for Environmental Law and Policy, American Rivers, Trout Unlimited, and Defenders of Wildlife, Respondents below, file this opposition to the Petition for Writ of Certiorari of Petitioners County of Okanogan, Early Winters Ditch Company, Inc., David C. Jones, and Frances A. Kaul.

STATUTORY PROVISIONS AT ISSUE

The Act of February 15, 1901 (1901 Act) is found at 43 U.S.C. § 959 and is set out in full in Appendix A to this Brief.

The Federal Land Policy and Management Act (FLPMA) is found at 43 U.S.C. §§ 1701 *et seq.* One relevant provision of FLPMA which is not set out in Petitioners' Appendix, 43 U.S.C. § 1765, is set out in Appendix B to this Brief.

Section 7 of the Endangered Species Act (Section 7) is found at 16 U.S.C. § 1536 and is set out in Petitioners' Appendix H.

STATEMENT OF THE CASE

A. Introduction.

This case involves the Forest Service's exercise of its long-established power to condition the renewal of a revocable special use permit for an irrigation ditch right-of-way

across National Forest lands. The court of appeals correctly held that the Forest Service has the power to condition the renewal of such a permit for the use of its land on operational restrictions necessary to ensure the survival of endangered chinook salmon and steelhead trout.

There is nothing remarkable about the lower court's decision. Under Section 505 of FLPMA, 43 U.S.C. § 1765, the Forest Service must include in a revocable permit for a ditch right-of-way conditions to protect fish and wildlife habitat and water quality. Other Federal statutes likewise authorize the Forest Service to preserve fish and wildlife within the National Forest system. Because the Forest Service has the discretion under FLPMA and other federal land management statutes to decide whether and upon what conditions to issue a right-of-way permit, it has an obligation under Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, to consult with the National Marine Fisheries Service (NMFS) and the Fish and Wildlife Service (FWS) over the effects the permit would have on endangered fish populations on and off National Forest lands and to ensure that renewal of the permit will not jeopardize these species.

The Forest Service's exercise of its authority to condition a revocable permit for the use of its land does not threaten, let alone assert, federal control over state water rights as Petitioners claim.

For these reasons, as further explained below, the Court should deny the petition.

B. Statutory Background.

1. Pre-FLPMA Right-of-Way Statutes.

Before Congress enacted FLPMA in 1976, two important statutes authorized grants of rights-of-way for irrigation ditches on Federal lands: the Mining Act of July 26, 1866, 43 U.S.C. § 661, and the Act of February 15, 1901, 43 U.S.C. § 959. *See Solicitor's Opinion – Rights-of-Way for Ditches and Canals*, 58 Interior Dec. 29 (1942); P. Fleming, *Vested Pre-FLPMA Rights of Way for Water Conveyance Facilities*, COLORADO LAWYER 83-85 (Feb. 1996).

Under the 1866 Mining Act, a water user could obtain a right-of-way across the public domain simply by acquiring a water right under local law and constructing a diversion system on public land. No application, filing, or approval by the Federal government was required. 43 U.S.C. § 661. The 1866 Act has been construed as creating a limited fee or easement that can be terminated only in an appropriate judicial proceeding authorized by law. *Kern River Co. v. United States*, 257 U.S. 147, 151-52 (1921). Significantly, however, the 1866 Mining Act did *not* apply to forest reserves or federal lands that had been reserved from the public domain *before* the water right vested under local law. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 447-48 (1955); *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939).

In contrast to the 1866 Act, the 1901 Act authorized the Secretary of the Interior to issue a right-of-way *permit* for irrigation ditches on *all* federal lands, including forest reserves. 43 U.S.C. § 959. However, the 1901 Act provided that:

> [A]ny permission given by the Secretary of the Interior under the provisions of this section may

> be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement or interest in, to, or over any public land, reservation or park.

Id. (emphasis added). As a consequence of this language, a right-of-way permit granted under the 1901 Act provided no more than a "revocable license." *Kern River*, 257 U.S. at 152. Congress gave federal land managers broad discretion to decide whether and on what conditions to issue a revocable permit under the 1901 Act:

> [S]uch permits shall be allowed within or through . . . any forest . . . *only* upon the approval of the chief officer of the Department under whose supervision such . . . reservation falls and *upon a finding by him that the same is not incompatible with the public interest.*

43 U.S.C. § 959 (emphasis added).

2. Federal Land Policy and Management Act.

Congress enacted FLPMA in 1976 to establish a policy that Federal lands would be managed in a manner which would protect the quality of "scientific, scenic, historical, ecological, environmental, air and atmosphere, water resource, and archeological values" and "provide food and habitat for fish and wildlife." 43 U.S.C. § 1701(a)(8). FLPMA repealed the "tangled array of laws granting rights-of-way across Federal lands" and replaced these statutes with a more comprehensive and detailed statutory scheme, 43 U.S.C. §§ 1761-71. *See United States v. Jenks*, 22 F.3d 1513, 1515 (10th Cir. 1994).

FLPMA authorizes Federal land managers to "grant, issue or renew rights-of-way" for "ditches . . . and other

facilities and systems for the . . . transportation, or distribution of water." 43 U.S.C. § 1761(a)(1). However, under FLPMA, such rights-of-way may not unduly compromise the protection of fish and wildlife habitat. Section 505 of FLPMA provides that rights-of-way *must* contain terms and conditions which will "minimize damage to . . . fish and wildlife habitat and otherwise protect the environment" and "require compliance with applicable . . . water quality standards established by or pursuant to applicable Federal or State law." *Id.* § 1765(a)(ii), (iii). Although Congress repealed prior right-of-way statutes, it included a savings clause which provides that nothing in FLPMA "shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of [the] Act." FLPMA, § 701(a), *reprinted in* Historical Note to 43 U.S.C.A. § 1701; *see also* FLPMA, § 701(h), *reprinted in* Historical Note to 43 U.S.C.A. § 1701 (administrative actions under FLPMA shall be "subject to valid existing rights"). Thus, right-of-way permits and easements issued under earlier statutes remained in effect after the passage of FLPMA, subject to the terms of those prior statutes. *Grindstone Butte Project v. Kleppe*, 638 F.2d 100, 101, n.2 (9th Cir. 1981).

3. Endangered Species Act.

The Endangered Species Act (ESA) protects species that have been listed as "endangered" or "threatened" under Section 4 of the Act, 16 U.S.C. § 1533. Section 7 of the ESA requires that Federal agencies:

> in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter

> in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical. . . .

16 U.S.C. § 1536(a)(2). The language of Section 7 "admits of no exception." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978). While Section 7 does not expand the powers of Federal agencies, it requires that agencies utilize their existing authorities in conformance with the mandates of the ESA:

> Section 7 substantially amplifies the obligation of federal agencies to take steps within their power to carry out the purposes of this act. . . . The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and every agency of the government is committed to see that those purposes are carried out. The agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.

Id. at 183-84.

To assist Federal agencies in complying with their Section 7 obligations, the ESA mandates an interagency consultation process designed to avoid actions which may jeopardize the survival of listed species or cause the destruction or adverse modification of their designated critical habitat. *See generally Bennett v. Spear*, 520 U.S. 154, 158 (1997). Under this process, a Federal agency proposing an "action" that "may affect" a listed species (the "action agency") must consult with NMFS or FWS (the "consulting agency") over the effects of the action on listed species

before the action may proceed. 16 U.S.C. § 1536(a)(2). The duty to consult applies to all actions, including on-going actions, in which there is "discretionary federal involvement or control" including "the granting of licenses, contracts, leases, easement, *rights-of-way*, *permits* or grants in aid . . . " 50 C.F.R. §§ 402.02, 402.03 (emphasis added). Consultation must include both the "direct and indirect effects" of the action on the species "together with the effects of other activities that are interrelated or interdependent with that action." 50 C.F.R. § 404.02.

In the first step of the consultation process, the action agency usually prepares and submits to NMFS or FWS a "biological assessment" analyzing the effect of the proposed action on the listed species. 50 C.F.R. § 402.14(a). For those actions that may adversely affect a species, the consulting agency must review all information provided by the action agency, as well as any other relevant information, to determine whether the proposed action is likely to jeopardize a listed species or destroy or adversely modify its designated critical habitat. 50 C.F.R. § 402.14(h)(3). This determination is set forth in a "biological opinion." *Id.*; 16 U.S.C. § 1536(b)(3)(A).

If the consulting agency concludes that the proposed action is likely to jeopardize a listed species, or destroy or adversely modify its critical habitat, it must identify and describe any "reasonable and prudent alternative" to the proposed action that it believes would avoid jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(B). A "reasonable and prudent alternative" may only consist of measures that are within the scope of the action agency's legal authority and jurisdiction, that can be implemented consistent with the purpose of the proposed action, and that will avoid

jeopardizing the continued existence of the listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.02.

Although an action agency is not strictly bound by the terms of a biological opinion because each action agency "has an independent duty" to prevent jeopardy to a listed species, its issuance nevertheless "alters the legal regime to which the action agency is subject." *Bennett*, 520 U.S. at 169. An action agency often has little expertise in biological and ecological matters, and should it choose to proceed outside the terms of a biological opinion, it does so "at its own peril[.]" *Id.* at 170.

C. Factual Background.

The Washington Forest Reserve, the predecessor of the Okanogan National Forest, was reserved from the public domain on February 22, 1897. *See* 29 Stat. 904; App. A-3. *Five years later*, the founders of the Skyline Ditch Company began their efforts to appropriate water. Water users on Early Winters Creek began their efforts several years after that.[1] App. A-3 and A-4. In addition to taking steps to appropriate water under State law, both groups sought permission from the Federal government to construct ditches across National Forest land to convey water to their properties. *Id.*

In 1903, the Skyline Ditch Company ("Skyline") applied to the Secretary of the Interior for a "permit to . . . [c]onstruct and maintain a water ditch for irrigation,

[1] Petitioners incorrectly assert that the irrigation ditches were constructed on "unreserved" public land. *See* Petition at 3.

domestic use and power purposes . . . [t]o be located upon the Washington Forest Reserve" on the Chewuch River. App A-3; Administrative Record ("AR") at SKY 4. The Secretary granted Skyline's permit application, subject to a "Special Privileges" contract which stated:

> It is further agreed and understood that the permission herein granted is subject to revocation by the Secretary of the Interior, *in his discretion, at any time,* notwithstanding the period for which this agreement is approved may not have then expired.

App A-3; AR at SKY 51 (emphasis added). A special use permit was issued by the Secretary which stated on its face: "Terminable at the discretion of the Forester of the U.S. Department of Agriculture." App. A-3; AR at SKY 54.

In 1971, the Forest Service reissued Skyline a "revocable and nontransferable" special use permit, which provided that the permit could be "terminated . . . at the discretion of the regional forester or the Chief, Forest Service." App. A-3 to A-4; AR at SKY 114-16. The permit included a fixed expiration date and provided for renewal only if the permittee "complies with the *then-existing* laws and regulations governing the occupancy and use of National Forest Lands." App. A-4; AR at SKY 116 (emphasis added). The permit "confer[red] no right to the use of water by the permittee." AR at SKY 116.

In 1909, Harry Briggs and others filed a notice with the State of Washington of their intent to establish a water right on Early Winters Creek and applied to the Forest Service for a special use permit allowing the construction of a ditch on Forest Service lands. App. A-4; AR at EW 12. In 1910, the Forest Service issued Briggs a special use

permit for the Early Winters Ditch which required the permittee to "comply with all laws and regulations governing National Forests" and provided that the permit would "terminate . . . at the discretion of the Forester." App. A-4; AR at EW 28. The 1910 permit was renewed several times. App. A-4. All of these permits required compliance with Forest Service regulations, were expressly terminable at the discretion of the Forest Service, and "confer[red] upon the permittee no right to use the water involved." App. A-4. Beginning in 1971, the Early Winters permits included a fixed expiration date and provided for renewal only if the permittee "complies with the *then-existing* laws and regulations governing the use and occupancy of National Forest lands." App. A-4 (emphasis added). All subsequent permits for both ditches stated that new permits would be issued "in the absolute discretion of the Forest Service," that the permits could be amended at the discretion of the Forest Service to incorporate new terms required by law, and the permit holders would comply with all applicable federal laws, including "relevant environmental laws." App. A-4.

In 1996, the Forest Service notified the permittees that their special use permits would expire at the end of that year and warned: "it is important that you understand that your [special use permit] will not be automatically renewed." AR at SKY 248, EW 198.

In 1997 NMFS listed Columbia River steelhead trout (*Oncorhynchus mykiss*) as an "endangered" species in accordance with section 4 of the ESA. 62 Fed. Reg. 43,937 (Aug. 18, 1997). Two years later, in 1999, NMFS listed Upper Columbia River spring-run chinook salmon (*Oncorhynchus tshawytscha*) as "endangered." 64 Fed. Reg. 14,308 (Mar. 24, 1999). Both of these species still inhabit

streams on the Okanogan National Forest, including the Methow River and its tributaries, Early Winters Creek and the Chewuch River. AR at EW 333, SKY 286-87. Steelhead trout and chinook salmon use these streams for spawning, rearing, and migration. *Id.* The level of water flowing in these streams affect the survival of these migratory or anadromous species. App. A-6.

In 1998, the Forest Service issued revised special use permits which were subject to amendment based on the consultation process required under Section 7 of the ESA to protect endangered steelhead trout and chinook salmon. App. A-5; AR at SKY 372, EW 271. As required by Section 7, the Forest Service then prepared biological assessments for the special use permits. App. A-5 and A-6. The biological assessments found that the Skyline Ditch was one of the two largest water diversions on the Chewuch River and that its fish screen was ineffective in protecting steelhead trout. App. A-5; AR at SKY 318. The Forest Service also found that operation of the Early Winters Ditch could dewater steelhead nests and reduce the spawning and rearing habitat available for steelhead trout and chinook salmon. App. A-5 and A-6; AR at EW 333. The Forest Service concluded that the continued use of National Forest lands for the operation of both ditches was "likely to adversely affect" endangered steelhead trout and chinook salmon. App. A-5 and A-6; AR at SKY 341, EW 334.

In accordance with Section 7 of the ESA, the Forest Service then initiated formal consultation with NMFS over the effects that operation of the two ditches would have on endangered steelhead trout and chinook salmon. App. A-6.

Two years later, NMFS issued biological opinions for renewal of the rights-of-way for the two ditches. *Id.* According to the biological opinions, operation of the Early Winters Ditch was "*not* likely to jeopardize the continued existence of Upper Columbia River steelhead or Upper Columbia River chinook salmon, or result in the destruction or adverse modification of designated critical habitat," provided the ditch was operated in accordance with a plan of operations agreed to by the Forest Service and the Early Winters Ditch Company. *Id.* This plan called for use of deep-water wells, instead of surface diversions from Early Winters Creek, to supply irrigation water under the Ditch Company and its members' state water rights during low flow conditions in Early Winters Creek and the Methow River immediately downstream. *Id.* This limitation in the renewed permit would help maintain instream flows needed to avoid jeopardy or adverse modification of critical habitat. *Id.*; AR at EW 1200 (emphasis added). By contrast, NMFS concluded that renewal of the permit for operation of the Skyline Ditch *was* "likely to jeopardize the continued existence of both steelhead and spring chinook salmon and result in the destruction or adverse modification of designated critical habitat." App. A-6. NMFS therefore proposed a reasonable and prudent alternative recommending that renewal of the permit for operation of the ditch include conditions limiting water flows in the ditch if necessary to maintain certain instream flows in the Chewuch River downstream of the ditch diversion. *Id.*; AR at SKY 930. The Forest Service subsequently inserted this recommended condition into the new Skyline permit. AR at SKY 1205.

D. Proceedings Below.

Petitioners filed an action for declaratory and injunctive relief against several federal agencies in the United States District Court for the Eastern District of Washington. Respondent conservation groups were permitted to intervene as defendants. The district court granted summary judgment in favor of the defendants. App. D-2. The court's opinion stressed that the case did not present "a controversy about water rights, but over rights-of-way through lands of the United States, which is a different matter." *Id.* at D-3. The court held that the Organic Administration Act, 16 U.S.C. § 475, and the Multiple-Use Sustained-Yield Act ("MUSYA"), 16 U.S.C. § 528, granted the Forest Service authority to include a minimum flow condition in a revocable special use permit where necessary to protect fish habitat. *Id.* at D-7. The court concluded that this authority was not diminished by FLPMA or any other subsequent enactment. *Id.* at D-7 to D-10. Based on the Forest Service's broad permitting authority over the rights-of-way in question, the district court held that the renewal of the special use permits was a discretionary action that was subject to the consultation requirements of Section 7 of the ESA. *Id.* at D-16.

The court of appeals affirmed. The court held that although the ESA does not grant agencies new powers, the Forest Service already had the authority to condition the use of revocable federal rights-of-way to protect endangered fish. App. A-8. The court reasoned that the special use permits themselves, "from their inception, provided the government with unqualified discretion to restrict or terminate the rights-of-way." *Id.* The court explained that its conclusion was supported by several statutes including FLPMA, 43 U.S.C. § 1765(a), the National Forest Management Act,

16 U.S.C. § 1604(g)(3), the Organic Administration Act, 16 U.S.C. § 475, and MUSYA, 16 U.S.C. § 528. *Id.* at A-8 and A-9. The court concluded that the addition of a minimum flow condition to the permits for use of National Forest lands violated no "valid existing rights" protected by Section 701 of FLPMA, because the permits were originally issued under the authority of the 1901 Act and were always revocable at the discretion of the Forest Service. *Id.* at A-9 and A-10.

Finally, the court rejected the Petitioners' claim that the Forest Service's actions constituted a seizure of water rights in conflict with this Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978). App. A-10. The court explained that *New Mexico* addressed the power of Congress to make an implied reservation of water rights when establishing the National Forests, but did not address the Forest Service's power to restrict the use of rights-of-way over federal land to protect fish and wildlife. *Id.* Quoting this Court's decision in *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917), the court explained that this case was "not a controversy over water rights, but over rights-of-way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned." *Id.*

REASONS FOR DENYING THE PETITION

1. None of the Court's criteria for granting a writ of certiorari has been met. Petitioners do not identify any circuit conflict and no conflict exists between the court of appeals decision and *United States v. New Mexico*, 438 U.S. 696 (1978). As explained by the court of appeals, this

case does not involve an implied reservation of water rights under the federal reserved rights doctrine or otherwise present a controversy over water rights. App. A-10. Rather, the case involves the statutory powers of the Forest Service to condition the use of revocable rights-of-way for the use of federal land where necessary to protect endangered fish. As this Court made clear in *Utah Power and Light*, 243 U.S. at 411, State water rights and federal rights-of-way are distinct matters that must be analyzed separately. The existence of a State water right does not guarantee a right-of-way over federal land.

2. This case does not present an important question of federal law warranting the Court's review. Rather, the case involves a narrow statutory question concerning the power of the Forest Service under FLPMA and other federal land management statutes to condition the use of a revocable permit for an irrigation ditch right-of-way across federal land where ditch operations under the right-of-way permit may imperil the survival of an endangered species both on and off National Forest lands. The court of appeals correctly decided that FLPMA and other federal statutes provided sufficient discretionary authority over the right-of-way permits at issue to trigger the consultation obligations of Section 7 of the ESA.

3. The court of appeals decision does not raise significant federalism concerns. The decision does not in any way permit the Forest Service to exercise general control over the water resources flowing off the National Forests or otherwise change the limited nature of federal authority to affect such rights. Under the court's decision, the Forest Service's authority to affect the manner in which State water rights may be exercised is limited, as always, to situations where the exercise of those rights

requires access to federal lands and the water right holder holds no vested right-of-way under federal law. The existing balance between the power of federal land managers to regulate access to and use of federal lands and the power of the states to allocate water resources has existed for over a century and was confirmed by this Court almost 90 years ago in *Utah Power and Light*. Nothing in the court of appeals decision in this case alters or seeks to alter that balance.

A. The Decision in This Case Does Not Conflict With Any Circuit Court or Supreme Court Decision.

Petitioners assert that certiorari is warranted based on a perceived conflict between the court of appeals decision and *United States v. New Mexico*, 438 U.S. 696 (1978). Petition at 15-18. However, the court of appeals correctly concluded that *New Mexico* was not relevant to the outcome of this controversy.

In *New Mexico*, the Court was called upon to determine the amount of water the United States reserved when it set aside a national forest under the "implied-reservation-of-water doctrine." 438 U.S. at 698-700. Under this doctrine, "Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, *impliedly* authorized him to reserve 'appurtenant water then unappropriated to the extent needed to accomplish the purposes of the reservation.'" *Id.* at 700, quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (emphasis in original). The amount of water impliedly reserved by Congress under this doctrine is limited to the "amount of water necessary to fulfill the purposes of the reservation, no more." *Id.*

The Court then examined the original purposes of the national forests to determine the quantity of water impliedly reserved when the national forests were set aside from the public domain in the late 19th century. The Court held that under the Organic Administration Act of 1897, 16 U.S.C. § 495, Congress intended national forests to be reserved for only two purposes – "to conserve the water flows and to furnish a continuous supply of timber" – and did not impliedly reserve water for other purposes such as fish and wildlife protection. *New Mexico*, 438 U.S. at 707-08. The Court recognized that the enactment in 1960 of MUSYA, 16 U.S.C. § 528, broadened the purposes of the national forests to include these and other objectives but held that MUSYA was not intended to expand the reserved water rights of the United States. *New Mexico*, 438 U.S. at 713.

Unlike *New Mexico*, the federal actions in this case do not rest on any implied reservation of water rights for National Forest lands. Instead, they rest on Congress's extremely broad powers under the Property Clause, U.S. Const. Art. IV, Sec. 3, to enact regulations to control the use and disposition of public lands. *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976); *Camfield v. United States*, 167 U.S. 518, 525-26 (1897). As this Court has held, Congress's powers under the Property Clause are "without limitations" and are "analogous to the police power of the several States." *Kleppe*, 426 U.S. at 540. Because this case involves the broad powers of Congress to restrict the use of rights-of-way over federal land to accomplish legitimate legislative purposes, and does not involve any federal reservation of water rights, there is no conflict with the "implied-reservation-of-rights" doctrine articulated in *New Mexico*.

Petitioners contend that the Forest Service may not exercise its delegated powers to restrict the use of rights-of-way across federal land in any way that would impair the use of State water rights. *See* Petition at 15-21. This Court rejected this argument long ago in *Utah Power and Light v. United States*, 243 U.S. 389 (1917), and had no occasion to revisit it in *New Mexico*. In *Utah Power and Light*, the Court held that State water right holders have no authority to maintain pipelines and other facilities on National Forest lands absent compliance with federal statutes and regulations controlling access to Forest Service land (specifically, the 1901 Act and its implementing regulations). *Id.* at 411. Writing for the Court, Justice Van Devanter reasoned that State water laws have "no bearing" upon a controversy involving the use of Federal lands, "save as they may have been adopted or made applicable by Congress." *Id.* at 405. He explained:

> [T]he inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use . . . and to prescribe conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power.

Id. The Court also made clear that rights-of-way across federal lands are legally distinct from the right to appropriate water.

> Much is said in the briefs about several congressional enactments providing or recognizing that rights to the use of water in streams running through the public lands and forest reservations may be acquired in accordance with local laws, but these enactments do not require particular mention, *for this is not a controversy over water*

> *rights but over rights of way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned.*

Id. at 410-11 (emphasis added).

The Ninth Circuit correctly applied the principles of *Utah Power and Light* as they have been uniformly applied by other circuit courts. *See City and County of Denver v. Bergland*, 695 F.2d 465, 483 (10th Cir. 1982). As Justice Van Devanter held in *Snyder v. Colorado Gold Dredging Co.*, 181 F. 62, 69 (8th Cir. 1910), "[t]he right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use, for that cannot be done without a grant from the landowner . . . ; and this although the particular circumstances be such that the proposed appropriation cannot be effected without the ditch." *Accord Hallauer v. Spectrum Props.*, 143 Wn.2d 126, 143-44, 18 P.3d 540, 549 (2001). Under these circumstances, there is simply no conflict with the Court's decision in *New Mexico*.

Petitioners contend that the Forest Service may not use its land management authority "to do indirectly what it has no authority to do directly, reallocate private water rights granted under state law thereby confiscating them in order to benefit fish." Petition at 18. However, nothing in the record supports the claim that the Forest Service has confiscated or otherwise taken or reallocated any water rights. As Petitioners acknowledge (Petition at 12), any water not diverted as a result of the condition placed on Petitioners' special use permits is subject to appropriation by Petitioners from points of diversion that do not require access to federal land. Indeed, under the agreed

operations plan for renewal of the Early Winters Ditch permit evaluated in the NMFS biological opinion, users of the Early Winters Ditch already exercise their water rights from private wells when operation of the ditch is restricted by the minimum flow conditions added to their special use permit. *See* AR at EW 1200; Exhibit 1 to Respondents' Summary Judgment Brief at 13. If the Forest Service had "confiscated" or "appropriated" Petitioners' water rights as alleged, the water would now belong to the Forest Service and could not be diverted by Petitioners or other appropriators from a non-federal point of diversion.

Petitioners also contend that conflicts exist between the court of appeals' interpretation of the Organic Act and MUSYA and this Court's interpretation of the same statutes in *New Mexico*. Petition at 16-18. In *New Mexico*, however, the Court focused on the scope of the implied reservation of water rights associated with the establishment of the National Forests. In this case, by contrast, the court of appeals and the district court analyzed the Forest Service's *power to regulate* rights-of-way across National Forest land under these and other statutes. The Court's holding in *New Mexico* that MUSYA's broadening of the purposes of the national forests did not expand the reserved water rights of the United States has no bearing on the Forest Service's power to *regulate the use of its own lands* to advance outdoor recreation, range, or wildlife and fish purposes. Indeed, in FLPMA, Congress expressly authorized the Forest Service to issue and renew rights-of-way for "ditches . . . for the . . . transportation . . . of water" subject to conditions that will "minimize damage to fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. §§ 1761(a)(1), 1765(a).

In short, because this case concerns the power of the federal government to regulate access to its lands, it is controlled by the Court's decision in *Utah Power and Light*. Because the case does not in any way involve an implied reservation of water rights or any other feature of the Court's holding in *New Mexico*, it is not in conflict with that decision or any other Supreme Court case.

B. This Case Does Not Present an Important Question of Federal Law That Has Not Been, but Should Be, Settled by This Court.

Petitioners claim in various places that this case presents important questions that warrant issuance of a writ of certiorari. However, all of Petitioners' arguments are premised on the theory that the Forest Service has "confiscated" State water rights for its own use. *See, e.g.*, Petition at 2. As discussed earlier, Petitioners' arguments fundamentally mischaracterize the nature of the Forest Service's actions. The Forest Service did not confiscate any State water rights, it simply placed conditions on the use of rights-of-way across federal lands to protect statutorily established Federal interests. As this Court held in *Utah Power and Light*, a right-of-way over federal land is a property interest distinct from the right to appropriate water and may only be acquired "by complying with some applicable statute and the lawful regulations." 243 U.S. at 410-11.

The rights-of-way at issue here involve ditches constructed *after* the Okanogan National Forest was reserved from the public domain and constructed under authority of

revocable special use permits issued in accordance with the 1901 Act. 43 U.S.C. § 959.[2] The 1901 Act expressly provided that such special use permits cannot be held to "confer any right, or easement, or interest in, to, or over" any Federal land. *Id.* Because Petitioners had no "valid existing rights" in Forest Service land that could be protected by Section 701(h) of FLPMA, the Forest Service was under no legal obligation to renew Petitioners' special use permits, let alone omit conditions necessary to comply with federal law, when they expired in 1996.

Since the Forest Service had the power to decline to renew the permits altogether, it plainly had the discretion under FLPMA to condition its renewal of the permits on restrictions necessary to prevent harm to endangered fish from reduced stream flows. *See, e.g., Public Lands Council v. Babbitt*, 529 U.S. 728, 741-43 (2000) (government could modify revocable permits under Taylor Grazing Act to meet new environmental goals); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987) (power to deny a permit includes the lesser power to conditionally approve it). Indeed, FLPMA expressly *requires* the Forest Service to include conditions in right-of-way permits where they

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[2] No permanent rights-of-way or easements exist under the 1866 Mining Act, 43 U.S.C. § 661, because the ditches were constructed well *after* the lands in question were reserved from the public domain as a forest reserve. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 447-48 (1955); *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939); *Hage v. United States*, 51 Fed. Cl. 570, 583 (2002). This distinguishes the present case from several other cases involving Mining Act rights-of-way where courts have imposed limits on the federal government's power to restrict the use of ditches crossing federal land. *E.g., Adams v. United States*, 3 F.3d 1254, 1260 (9th Cir. 1993); *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967).

are necessary to minimize damage to fish and wildlife habitat and require compliance with applicable water quality standards.[3] 43 U.S.C. § 1765. Where use of a ditch right-of-way is likely to reduce flows in a stream to the point that fish and wildlife habitat are harmed and water quality standards are violated, the Forest Service not only has the authority under FLPMA to either deny the permit application or condition its approval on terms necessary to prevent such harm but it also has the duty to do so. The Forest Service's express powers under FLPMA relating to rights-of-ways are reinforced by more general statutes such as MUSYA, 16 U.S.C. § 528, and the National Forest Management Act, 16 U.S.C. § 1604(g), which authorize the Forest Service to take actions to protect fish and wildlife within the National Forest system.

Because the Forest Service had the discretion to either decline to renew the permits or condition its renewal of the permits on implementation of measures to protect fish and wildlife habitat and water quality, it was required by Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, to consult with NMFS over the effect that renewal of the permits would have on the endangered steelhead trout and chinook salmon that inhabit the streams on and off National Forest lands affected by those diversions. *See* 50 C.F.R. § 402.03 (requiring consultation for all actions where there is "discretionary federal involvement or control"). And, because agencies are required

[3] Washington state water quality standards protect stream flows needed to maintain fish habitat and other beneficial uses of water. *See Public Util. Dist. No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 718-19 (1994).

by the ESA to consider both the direct and indirect effects of their actions on endangered species "together with the effects of other activities that are interrelated or interdependent with that action," the effect of reduced flows resulting from use of the diversions on threatened and endangered species was a necessary and proper subject of Section 7 consultation. 50 C.F.R. § 404.02; *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985) ("The fact that the reduction in water does not result 'from direct federal action does not lessen the [government's] duty under § 7.'"), quoting *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 374 (5th Cir. 1976). As NMFS made clear in its biological opinions, the decreased stream flow resulting from the continuing operation of the diversions on Forest Service land was subject to consultation under Section 7 as an *indirect* effect of the action – not the action itself. AR at EW 1185; SKY 915.

Properly analyzed, as it was by the court of appeals, this case involved a straightforward application of "properly stated" federal right-of-way and endangered species law to renewal of revocable right-of-way permits. As such, there is no basis for issuance of a writ of certiorari.

C. The Court of Appeals Decision Raises No Federalism Concerns.

Finally, Petitioners contend that the Court should grant a writ of certiorari because the court of appeals decision raises important issues of federalism. Petition at 11-14. In essence, Petitioners contend that the Forest Service is usurping the authority of the State of Washington to

manage water resources by taking actions that result in a *de facto* priority for instream flows over more senior out-of-stream uses. *Id.* at 12. This position once again confuses appropriate and well-established federal regulation of the use of federal land with state authority over state water rights.

The court of appeals decision recognizes the authority of federal agencies to condition a revocable permit for a ditch right-of-way across federal land to protect an endangered or threatened species. Such a result should not be surprising as this Court's 1917 decision in *Utah Power and Light* made clear that a State water right holder must obtain the permission of the United States if the right holder wishes to use reserved federal lands to convey the water to his private property. *See Solicitor's Opinion, Death Valley National Monument – Appropriation of Water*, 55 Interior Dec. 371, 373 (Oct. 22, 1935) (rule that the federal government surrendered to the states the right to control the use of water "does not apply with respect to reserved public lands, unless the water can be diverted at a point not affected by the reservation or unless a right of way has been obtained in accordance with laws of the United States"). The permit conditions appropriately leave the state water right holder free to exercise the state water right, either by accepting permit conditions the Forest Service must impose in order to comply with federal laws governing the use of federal lands, or by exercising the water right in a way that does not require permissive use of federal lands. Any other outcome would risk subordinating the requirements of federal law that apply to federal lands to state law.

It was clear on the face of the 1901 Act and Petitioners' special use permits themselves that the Forest Service

always had the power to revoke the rights-of-way at issue in this case or include new conditions where necessary to protect federal interests. Petitioners essentially are asking the courts to rewrite their revocable permits and grant them permanent easements by judicial fiat in derogation of the statutory powers of federal land managers to revoke or condition revocable special use permits in accordance with FLPMA and the ESA. The relief requested by Petitioners would itself raise serious concerns under the Supremacy Clause as it would render the Forest Service's statutory powers over rights-of-way across federal lands subservient to the decisions of State water resource agencies. The court of appeals decision maintains the existing and appropriate balance between the federal government's statutory powers to regulate rights-of-way in order to protect its property and interests and the authority of the states to regulate the use of water.[4]

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[4] Congress sought to address some of Petitioners' concerns when it enacted the "Ditch Bill" which authorizes the Secretary of Agriculture to issue permanent easements for irrigation ditches crossing Forest Service land that were in existence before the enactment of FLPMA (Oct. 21, 1976). Pub. L. 99-545, 100 Stat. 3047 (Oct. 27, 1986). To qualify for a permanent easement under the Ditch Bill, however, existing agricultural water right holders were required to submit an application to the Forest Service on or before December 31, 1996. 43 U.S.C. § 1761(c)(1). Despite being notified of their rights under the Ditch Bill, neither Skyline nor Early Winters submitted an application for a permanent easement to the Forest Service before this deadline. *See* AR at SKY 229, EW 184.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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Appendix A-1

43 U.S.C. § 959

UNITED STATES CODE ANNOTATED
TITLE 43. PUBLIC LANDS
CHAPTER 22 – EASEMENTS

§ 959. Rights-of-way for electrical plants, etc.

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs, used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timer or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him

that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Appendix B-1

43 U.S.C. § 1765

UNITED STATES CODE ANNOTATED
TITLE 43. PUBLIC LANDS
CHAPTER 35 – LAND POLICY AND MANAGEMENT
SUBCHAPTER V – RIGHTS-OF-WAY

§ 1765. Terms and conditions

Each right-of-way shall contain –

(a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards; and

(b) such terms and conditions as the Secretary concerned deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration

feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.